Supreme Court, U.S.
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NO 94 -

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RONALD B. ANDREWS
Petitioner

V.

ALASKA OPERATING ENGINEERS-EMPLOYERS TRAINING TRUST FUND
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW:

Does ERISA preempt state law claims for wrongful discharge, and breach of contract, merely because the plaintiff is employed by an ERISA regulated trust where the state claims can be resolved without interpreting the employee benefit plan?

PARTIES

The parties to this suit are fully stated in the caption, neither party has a parent entity.

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OPINIONS BELOW

Ronald Andrews seeks review of Andrews v. Alaska Operating Engineers Employers Training Trust Fund, 871 P.2d 1142 (Alaska 1994) (attached as Appendix A). This opinion affirmed a Superior Court order dismissing the suit. There was no written Superior Court opinion.

JURISDICTIONAL STATEMENT

The trial court ruled that the complaint was preempted by 29 U.S.C. § 1144(a) and dismissed the suit. Petitioner filed a timely appeal with the Supreme Court of Alaska. The Supreme Court issued a final opinion on April 8, 1994. Andrews v. Alaska Operating Engineers-Employers Training Trust Fund,

871 P.2d 1142 (Alaska 1994) (attached as Appendix A). This petition is timely filed within 90 days under Supreme Court Rules 13.1 and 13.4. Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

This case involves an interpretation of the Employment Retirement Income Security Act of 1974 ("ERISA") Pub. L. No. 93-406, 88 Stat. 1-514, 3001-4082 (codified as amended at 29 U.S.C.A. §§ 1001-1461 (1985 & 1994 Supp.) whereby Congress invoked the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and preempted state law relating to ERISA.

The statutory provision at issue states:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede

> any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

29 U.S.C. § 1144(a).

"State law" includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). "State" is defined to be "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employment benefit plans covered by this title." 29 U.S.C. § 1144(c)(2).

STATEMENT OF THE CASE

Alaska Operating Engineers-Employers Training Trust Fund ("Trust") is a trust fund established to provide job-related training to workers represented by Local

No. 302 of the International Union of Operating Engineers. It is subject to regulation by ERISA and is an "employee welfare benefit plan." 29 U.S.C. §§ 1002(1), 1003(a).

Petitioner Ronald Andrews worked as an administrative manager for respondent from March, 1986 until his termination on October 31, 1989. Beginning in early 1989 some of the trustees began to question Andrews' job performance. George Williams, chairman of the Board of Trustees, however, supported Andrews and convinced other members that they should keep him as the administrative manager.

Some time in October of 1989, Andrews sought advice on the legality of Williams' travel reimbursement practices from the Trust's attorney, James Gasper. Gasper reported the inquiry to Williams. Williams immediately solicited and

obtained Andrews' termination from the Board.

Andrews filed suit in state court alleging wrongful discharge in violation of Alaska's public policy and breach of the covenant of good faith and fair dealing, which is implied into every employment relationship in Alaska. The Trust moved to dismiss the complaint for lack of subject matter jurisdiction, because Andrews' claims were preempted by ERISA. The trial court granted the Trust's motion and Andrews appealed to the Supreme Court of Alaska. The Supreme Court of Alaska affirmed and dismissed the case for lack of subject matter jurisdiction. Andrews files this petition seeking review of the State court decision.

Andrews filed a second suit, on April 5, 1993, in federal court alleging

violations of ERISA in connection with the same incident to avoid being time barred from any potential claims under ERISA. The proceedings in that case have been stayed by stipulation until the resolution of this appeal.

REASONS FOR GRANTING THE WRIT

I. This Court Has Not Addressed, And Other Courts Have Been Unable To Consistently Determine, When State Law Protecting Employees' Rights Is Preempted By ERISA.

ERISA preemption is broad in both statutory language and court interpretation. 29 U.S.C. § 1144(a); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98-99, 103 S. Ct. 2890, 2900-01, 77 L. Ed.2d 490, 501 (1983). State law that "relates to any employee benefit plan" is superseded by ERISA. 29 U.S.C. § 1144(a). ERISA preemption is, however, not without limits. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139, 111 S.

Ct. 478, 483 112 L. Ed.2d 474, 484 (1990) ("Notwithstanding its breadth, we have recognized limits to ERISA's pre-emption clause"). "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law [is preempted by ERISA]." Shaw v. Delta Air Lines, Inc., at 100, n.21 103 S. Ct. at 2901 n. 21, 77 L. Ed.2d at 503 n.21 (1983).

Under the most extreme interpretation, any state law affects an ERISA plan[1] whose administrative offices are located in that state. Because all ERISA plans must be administered by people, and those people will live in one of the several states, differences in state law will always place a burden, albeit usually incidental, upon ERISA

[1] As used in this petition "ERISA plan" refers to any employee benefit plan covered in 29 U.S.C. § 1003.

plans. If, for example, a state chooses to have a more stringent building code than its neighbor and an ERISA plan chooses to move its administration building to that state it would be burdened by the more stringent code. In the broadest sense, therefore, every state law can be seen as having a "connection" with an ERISA Plan. Shaw v. Delta Air Lines, Inc., at 97-98, 103 S. Ct. at 2900, 77 L. Ed.2d at 501 ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan").

At what point does a burden created by state law become so severe that the law "relates to" ERISA and is preempted? The point is not evident in the statute itself. See, 29 U.S.C. § 1144(a). A line must be judicially created between

laws whose burden is too tenuous or remote to be preempted and laws that have a connection with ERISA. Hashimoto v. Bank of Hawaii, 999 F.2d 408, 410 (9th Cir. 1993) ("as is typical in cases involving federal preemption of state law, a line must be picked out by court decisions as to what is preempted and what is not preempted.") Prior decisions of this Court suggest, as Andrews argues, that the line should be placed at the point where an employee's state law case requires interpretation of provisions in ERISA, the regulations promulgated to implement ERISA or the terms of an ERISA regulated plan. See e.g., Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988).

The court has faced ERISA preemption in at least fourteen cases since 1981.[2] None of these cases, however, dealt with the employees of an ERISA plan. Nor has the Court faced a situation where an employee brings a state law claim which does not require an interpretation of an

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[2] John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank, 114 S. Ct. 517, 126 L. Ed.2d 524 (1993); District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 121 L. Ed.2d 513 (1992); Barnes v. E-Systems, Inc. Group Hosp. Medical & Surgical Ins. Plan, 112 S. Ct. 1, 115 L. Ed.2d 1087 (1991); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed.2d 474 (1990); FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed.2d 356 (1990); Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed.2d 836 (1988); Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 108 S. Ct. 830, 98 L. Ed.2d 936 (1988); Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed.2d 1 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed.2d 55 (1987); Pilot Life Ins. Co. v. Pedeaux, 481 U.S. 41, 107 S. Ct. 1544, 95 L. Ed.2d 39 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed.2d 728 (1985); Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust For Southern California, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed.2d 420 (1983); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 103 S. Ct. 2880, 77 L. Ed.2d 490 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S. Ct. 1895, 68 L. Ed.2d 402 (1981).

ERISA plan or ERISA. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed.2d 474, the decision most closely on point, dealt with an employee, who alleged he was fired in order to prevent him from receiving ERISA regulated benefits. The employee was fired four months before he would have vested as a ten year employee under the ERISA Plan. The existence of benefits under the ERISA plan was an element of the employee's case. Texas law required the employee to show that the principal reason for his discharge was the employers intent to avoid paying ERISA benefits. Id. at 136, 112 S. Ct. at 481, 112 L. Ed.2d at 482. "[U]nder the Texas court's analysis there simply is no cause of action if there is no plan." Id. at 140, 112 S. Ct. at 484, 112 L. Ed.2d at 485 (emphasis in original). This Court

concluded, therefore, that the suit "related to" ERISA and was preempted.

Petitioner, here, presents the case which was not decided in Ingersoll-Rand: a plaintiff-employee whose case does not depend upon the existence of the ERISA plan, but whose suit could conceivably have an incidental affect on administration of the plan.

In the absence of an opinion by this Court, numerous state and lower federal courts have struggled to define where employee claims of employer misdeeds are preempted by ERISA. A conflicting body of case law has developed. Some courts apply Ingersoll-Rand broadly and preempt nearly every state law claim. See e.g. Van Camp v. A.T.& T. Information Systems, 963 F.2d 119, 123 (6th Cir. 1992) cert. denied 113 S. Ct. 365, 121 L. Ed.2d 278 (1992) (sex and age discrimination claims

were preempted because "claims directly affect the status of A.T.& T. as employer and Van Camp as beneficiary"); Settles v. Golden Rule Ins., 927 F.2d 505 (10th Cir. 1991) (action seeking damages for death of husband, who died of heart attack after defendant canceled health insurance was preempted); Howard v. Parsian, Inc., 807 F.2d 1560, 1563 (11th Cir. 1987) (state law action challenging denial of ERISA benefits was preempted).

Other courts, however, recognize that some state law employee rights have such small impact on, or connection to, an ERISA plan that they do not "relate to" it and are not preempted. See e.g. General American Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1521 (9th Cir. 1993) (where an ERISA plan operates as any other commercial entity, the relationship between the ERISA plan and

its creditors is not one regulated by ERISA and is, therefore, not preempted); Clark v Coats & Clark, Inc., 865 F.2d 1237, 1242-1245 (11th Cir. 1989) (while facts supporting former employee's claim of intentional infliction of emotional distress occurred during the same period as employee's ERISA claim, the two were not related); Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1404-05 (9th Cir. 1988) (plaintiff's claim for wrongful discharge as a result of union activity mentioned lost wages and benefits, but was not preempted because "loss of pension benefits was a mere consequence of, but not a motivating factor behind, the termination of benefit"); Sorosky v. Burroughs Corp., 826 F.2d 794, 800 (9th Cir. 1987) (claim for wrongful discharge which depended upon termination without good cause was

not preempted); Lane v. Goren, 743 F.2d 1337, 1340 (9th Cir. 1984) (age and race discrimination claims were not preempted because state law regulated ERISA plan "in its capacity as an employer, and in a way that all other employers are affected").

At least one state court has expressed concern that an extremely broad interpretation of ERISA's preemption will protect unscrupulous employers while denying a remedy for just employee grievances. Pace v. Signal Technology Corp., 417 Mass. 154, 160, 628 N.E.2d 20, 22 (Mass. 1994). "That a statute whose clear purpose was to benefit employees has become widely used as shield to protect employers from any deceptive and wrongful acts they may have committed against their employees is an irony we

find unacceptable as a governing principle of law." Id.

In Pace an employee alleged that he was promised six months health insurance after termination, but under the terms of the insurance plan his insurance coverage ended upon termination. The court noted that the employee was not contesting the lack of coverage, but was only alleging that his employer misrepresented the existence of coverage. Because the suit did not require an interpretation of the ERISA plan, the court concluded that the state law suit for misrepresentation was not "related to" ERISA. Id. at 22.

The absence of a decisive opinion by this Court and the existence of widely divergent lower court decisions has prevented consistent application of ERISA's preemption provision.[3] Some

[3] Consistent application throughout the country is, of course, the reason for the preemption provision in the first

courts have found the lack of consistent precedent to be so frustrating they explicitly limit their analysis of previous decisions to those that supported their ultimate conclusion. Cutler v. Phillips Petroleum Co., 71 Wash. App. 511, 859 P.2d 1251 1254. (Wash. App. 1993) ("Unfortunately, there is ample, well reasoned authority which would support either position."); Pace v. Signal Technology Corp., at 157, 628 N.E.2d at 22; see also General American Life Ins. Co. v. Castonguay, 984 F.2d at 1521 ("It's far easier to make 'I know it when I see it' decisions in this field than to come up with a general rule.")

The court in Cutler held that six state law claims, including one for breach of contract, were not preempted by

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place. Ingersoll-Rand Co. v. McClendon, at 142, 111 S. Ct. at 484, 112 L. Ed.2d at 486.

ERISA. Employees alleged that their former employer had misled them into accepting employment with the new owner of their firm by assuring them they would receive the same benefits. The new owner shut down the plant and the employees did not receive equivalent benefits under their ERISA plan. The Court reasoned that ERISA was only involved in this suit as a measure of damages and that the core of the suit did not "relate to" ERISA.

In the face of conflicts between state and federal courts and among the federal circuits there is a strong need for clear legal guidelines. ERISA is an ambitious federal program. By its terms, it purports to regulate all employee benefit plans created by any employer engaged in interstate commerce or any industry affecting interstate commerce.[4]

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[4] Employee benefit plans include both pension plans and welfare plans. 29 U.S.C.A. § 1002(3). An employee

Many people are employed by organizations administering ERISA regulated plans. All of these people are within the legal vacuum created by the absence of a decision by this Court on whether ERISA preempts their state law rights. Gregory, The Scope Of ERISA Preemption Of State Law: A Study In Effective Federalism, 48 U. Pitt. L. Rev. 427, 457-458 (1987).

The facts of this case present the perfect opportunity to define the scope of ERISA preemption in the employment context. Andrews was employed by an ERISA regulated trust. He was fired for reporting suspected abuse of

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welfare plan is "any plan, fund, or program, . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death . . . "29 U.S.C.A. § 1002(1).

administrative funds. State law provides a cause of action for people fired in retaliation for reporting suspected breaches of a fiduciary duty.[5] Andrews' state law suit is one step more removed in its relation to ERISA than was the plaintiff's suit in Ingersoll-Rand. This case is, therefore, an excellent opportunity to provide a bright legal line in the nebulous world of ERISA preemption in employment cases.

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[5] Petitioner's allegation that he was terminated in violation of public policy is supported by ARCO Alaska Inc. v. Akers, 753 P.2d 1150, 1154 (Alaska 1988) ("Where a party's conduct in breaching a contract rises to the level of a traditionally recognized tort ... an action in tort would lie") and A.S. 13.36.070 (trustee has duty to administer trust for benefit of beneficiaries). Petitioner's contract claim is supported by Reed v. Municipality of Anchorage, 782 P.2d 1155, 1158 (Alaska 1989); Knight v. American Guard & Alert, Inc., 714 P.2d 788, 791-92 (Alaska 1986); and Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983) (employment contracts contain an implied covenant of good faith and fair dealing).

II. The Supreme Court Of Alaska Erred: Andrews' State Law Claims Are Not Preempted By ERISA.

A. The Supreme Court of Alaska's Ruling is Erroneous.

The Supreme Court of Alaska held that petitioner's claims for retaliatory firing in violation of public policy and for breach of contract were preempted because (1) they related to ERISA and (2) ERISA provided a remedy. In concluding that petitioner's claims related to ERISA the court assumed that petitioner would base its case on an interpretation of the fiduciary duties required by ERISA. This assumption was not correct.

Alaska has explicitly recognized a public policy requiring trust fiduciaries to use trust funds for the sole benefits of the beneficiaries. A.S. 13.36.070 (requiring a trustee to administer funds for the sole benefit of the trust

beneficiaries); A.S. 11.46.620 (establishing a criminal violation for misuse of trust funds); see Luedtke v. Nabors Alaska Drilling Inc., 768 P.2d 1123, 1132 (Alaska 1986) (["W]e look to the entire body of law in the State of Alaska for evidence of citizen rights, duties and responsibilities, to determine the public policy. . . ."). This policy applies uniformly to all trusts regardless of whether or not the trust is an ERISA regulated benefit plan. Being fired for reporting a suspected violation of this public policy is actionable under state law. Reed v. Municipality of Anchorage, 782 P.2d. 1155, 1158 (Alaska 1989); see also ARCO Alaska Inc. v. Akers, 753 P.2d 1150, 1154 (Alaska 1988).

Similarly, Alaska has an implied covenant of good faith and fair dealing in all employment contracts. Reed v.

Municipality of Anchorage, 782 P.2d at 1158; Mitford v. de Lasala, 666 P.2d. 1000, 1007 (Alaska 1983). The obligation to perform in good faith prevents employers from terminating their employees in violation of public policy. Id.; Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d at 1130; State v. Haley, 687 P.2d 305 (Alaska 1984); Eldridge v. Felec Services, Inc., 920 F.2d 1434, 1437 (9th Cir. 1990). Andrews' case is based upon state law and will not require ERISA interpretation.

The court is also mistaken that ERISA would provide a remedy for violations of Alaska public policy. The situation here is analogous to Clark v Coats & Clark, Inc., 865 F.2d at 1242-1245. In Clark, a former employee brought a claim under ERISA that he was fired to avoid paying benefits under an

ERISA pension plan and that his employer intentionally inflicted emotional distress in terminating him. The court held that although the facts to support each claim occurred at the same time, they were not related. Here, Andrews alleges state law claims, which occurred at the same time as a potential violation of ERISA, but are based upon different legal theories and are wholly independent of any interpretation of ERISA or the ERISA regulated benefits plan. The same set of operative facts can give rise to several causes of action. Plaintiffs are generally free to pick from among the various causes of action available, those he or she chooses to pursue.

B. Andrews' Claims Are Not Preempted Because They Do Not Require An Interpretation Of ERISA Or An ERISA Plan.

The purpose of the ERISA preemption was best stated by this Court in Fort

Halifax Packing Co. v. Coyne, Inc., 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987):

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain ways in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

Id. at 9, 107 S. Ct. at 2216, 96 L. Ed. 2d at 10; Ingersoll-Rand Co. v. McClendon, at 142, 111 S. Ct. at 484, 112 L. Ed.2d at 486 (1990) ("[T]he goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government.").

Although the Alaska court identifies Andrews' argument that ERISA does not preempt suits which do not require an interpretation of ERISA or an ERISA plan, it fails to explicitly address it. Andrews v. Alaska Operating Engineers-Employment Training Trust Fund, 871 P.2d at 1144 ("Andrews argues that this claim is not preempted by ERISA since the claim does not require an interpretation of the underlying benefit plan"). Instead, the court bases its analysis on cases where

the state law suit required an interpretation of ERISA, thereby implicitly rejecting Andrews' argument and expanding ERISA preemption. The court's interpretation, however, conflicts with the Congressional purpose of ERISA preemption. The purpose was to avoid inconsistent regulation between states. "Relates to" should, therefore, be interpreted to mean any action that requires an interpretation of any ERISA provision or a provision in an ERISA plan. This would provide the much needed clear distinction between preempted and not preempted state employment law claims, while preserving the Congressional purpose behind ERISA's broad preemption.

Requiring preemption of conflicting state law up to, but not beyond, the point where the state law requires

interpretation of provisions in ERISA or in an ERISA plan would further the purpose behind the preemption provision while leaving to state regulation those areas traditionally regulated by the individual states. Administrative burdens caused by differing state regulations would be de minimus. All interpretations of ERISA provisions or ERISA plans would be governed by federal law creating a nationally uniform body of law. At the same time, states would be allowed to regulate their internal affairs. If ERISA preempted all state laws "federal courts would have to invent a federal common law of contracts, torts, property, corporations -- something that would run against the grain of our federal system." General American Life Ins. Co. v. Castonguay, 984 F.2d at 1522 (Kozinski J.). In the absence of the

federal common law that concerns Judge Kozinski, ERISA plans would effectively be given a license to violate state law on everything from housing codes to wage and hour requirements. Under Andrews interpretation, the anomaly that employees of ERISA plans have less employment law protection than employees of other commercial organizations within the state (a result that follows from the Alaska's supreme court ruling) would be minimized. Employers would be less able to use ERISA as a liability shield for their misdeeds. See Pace v. Signal Technology Corp., at 160, 628 N.E.2d at 22.

Allowing state law claims, which do not require interpretation of ERISA or ERISA plans, is also supported by analogy to cases under the preemption provisions of the Labor-Management Relations Act of

1947 ("LMRA") 29 U.S.C.A. §§ 141-197. These cases provide insight because Congress chose to model ERISA's preemption on the, then existing, preemption clause in LMRA. Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 65, 107 S. Ct. 1542, 1547, 95 L. Ed.2d 55, 64; Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 54, 107 S. Ct. 1549, 1557, 95 L. Ed.2d 39, 52 (1987) ("The legislative history demonstrates that the pre-emptive force of [ERISA's civil remedy provision] was modeled after § 301 of LMRA"). Congress specifically stated that ERISA's civil remedy provision, 29 U.S.C. § 1132(a), is modeled upon the civil remedy provision in the LMRA. HR Conf. Rep. No. 93-1280, p. 327 (1974). The purposes of the preemption provisions in the two labor statutes are the same. Metropolitan Life

Insurance Co. v. Taylor, at 65, 107 S. Ct. at 1547, 95 L. Ed.2d at 64.

In LMRA cases, this Court established the distinction which petitioner argues is applicable to ERISA. In keeping with the purpose of LMRA's preemption provision to provide uniform interpretation of labor agreements and federal law, state law claims are only preempted when their resolution requires an interpretation of either LMRA or the collective bargaining agreement. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed.2d 410 (1988) (unanimous decision) ("[W]e hold that an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement"). All other rights conferred

by state law are not preempted. Livadas v. Bradshaw, 62 U.S.L.W. 4495, 4499 (U.S. June 14, 1994) reversing 987 F.2d 552 (9th Cir. 1993). Lingle's state law suit for retaliatory discharge was not pre-empted because it did not require an interpretation of the collective bargaining agreement.

The distinction created in Lingle has been applied to Alaska law by the Ninth Circuit in Eldridge v. Felec Services, 920 F.2d 1434. Plaintiff was injured on the job and filed a claim for workman's compensation. His employer discharged him. He then filed suit for both breach of Alaska's convenant of good faith and fair dealing and discharge in violation of public policy. Plaintiff's theory was that he was fired in retaliation for filing a workman's compensation claim and for encouraging

others to file similar claims. The court held that the employer's motivation in discharging plaintiff controlled and consequently there was no need to interpret the collective bargaining agreement. Id. at 1439. The suit was, therefore, not preempted by LMRA.

Eldridge is parallel to the situation in this case. Petitioner is bringing a suit for breach of the covenant of good faith and fair dealing and for discharge in violation of public policy. He alleges that he was fired in retaliation for reporting a suspected misuse of funds. The employer's motivation for the discharge is primary. There is, therefore, no need to interpret any ERISA plan.

The Alaska Supreme Court relied upon several cases interpreting state whistle blower laws. See Hashimoto v. Bank of

Hawaii, 999 F.2d 408 (9th Cir. 1993); Authier v. Ginsberg, 757 F.2d 796 (6th Cir. 1985) cert. denied, 474 U.S. 888, 106 S. Ct. 208, 88 L. Ed.2d 177 (1985); McLean v. Carlson Companies, 777 F. Supp. 1480 (D. Minn. 1991); see also Anderson v. Electronic Data Systems, 11 F.3d 1311 (5th Cir. 1994) (not cited by the Alaska Supreme Court). In all of these cases, however, plaintiff's claim required an interpretation of whether there had actually been an ERISA violation. In Hashimoto and McLean the state whistle blower protection statute required that a suspected violation be reported in good faith. The trial would necessarily involve a showing that there was a reason to believe ERISA was, in fact, violated, which would in turn require interpreting ERISA. In Authier, plaintiff alleged that he was fired for fulfilling duties

proscribed by ERISA. "ERISA created a substantive element of the Michigan action[.]" Authier v. Gingberg, 757 F.2d at 800. At trial, plaintiff would have to show that he was acting in accordance with ERISA.

In contrast to these cases, petitioner's state law suit does not depend upon any showing of an ERISA violation -- or of Andrews' good faith belief in an ERISA violation. There is no question that had Mr. Williams done what petitioner thought he did it would violate Alaska's public policy against abuse of funds by fiduciaries. See A.S. 13.36.070. The fact that petitioner suspected and reported such a violation is enough to entitle him to be protected from retaliatory firing upon reporting his suspicions. Reed v. Municipality of Anchorage, 782 P.2d at 1158. There is no

need for petitioner to make any showing as to existence of an ERISA violation.

III. CONCLUSION.

Ronald Andrews was the Trust's employee. As such, he was afforded certain rights by Alaska law. These rights exist independent of ERISA and should not be preempted by ERISA. This Court has not had the opportunity to decide the scope of ERISA preemption in the context of employees of ERISA plans. Other courts have created a conflicting and confusing body of case law. Under the Supreme Court of Alaska's ruling, Andrews, like all those who are employed by ERISA plans, has less protection against employer misdeeds than his fellow state citizens simply because he worked for an ERISA plan. The Court should grant certiorari to provide guidance in this important area.

Respectfully submitted this 29 day of June, 1994.

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APPENDIX A
ALASKA SUPREME COURT OPINION

THE SUPREME COURT OF THE STATE OF ALASKA

RONALD B. ANDREWS,	)	
	)	
Appellant,	)	Surpreme Ct. No.
	)	S-5615
vs.	)	
	)	
ALASKA OPERATING ENGINEERS-EMPLOYERS TRAINING TRUST FUND,	)	Superior Ct. No. 3AN-91-2241 CI
	)	O P I N I O N
Appellee.	)	
	)	April 8, 1994

Jeffrey A. Friedman, Friedman, Rubin & White, Anchorage, for Appellant.

Bruce McKenzie, Donaldson, Kiel & McKenzie, P.S., Seattle, Washington, and Russell Winner, Winner & Associates, Anchorage, for Appellee.

Before: Moore, Chief Justice, Rabinowitz, Matthews and Compton, Justices, and Bryner, Justice, pro tem.*

MOORE, Chief Justice.

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* Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

INTRODUCTION

This case arises out of a dispute between the fiduciaries of an employee welfare benefit plan governed by the Employee Retirement Income Security Act (ERISA). Ronald Andrews was terminated from his position as administrative manager of the Alaska Operating Engineers-Employers Training Trust Fund (the Trust). He then filed suit alleging that he was discharged to prevent him from reporting possible misuse of trust funds by a trustee. In his complaint, he asserted that his termination violated the public policy of Alaska and constituted a breach of the convenant of good faith and fair dealing. The Trust responded by arguing that these claims were preempted by ERISA and were therefore subject to the exclusive jurisdiction of the federal courts. The

trial court agreed with the Trust and dismissed Andrews' claims. We affirm.

FACTS AND PROCEEDINGS

The Alaska Operating Engineers-Employers Training Trust Fund is a collectively bargained, joint management/labor trust fund, subject to coverage under ERISA as an "employee welfare benefit plan." 29 U.S.C. §§ 1002(1), 1003(a) (1988). The purpose of the Trust is to provide job-related training to apprentices and journeyment represented by Local No. 302 of the International Union of Operating Engineers.

Beginning in 1986, Andrews was employed as administrative manager of the Trust. As administrative manager, Andrews had broad responsibilities, including recruiting and supervising apprentices and Trust employees,

transferring money from the Trust's investment manager to the Trust's checking account and disbursing checks on behalf of the Trust.

In 1989 some of the trustees became concerned about Andrews' job performance. Andrews alleges that George Williams, the chairman of the Board of Trustees, convinced the other trustees not to fire him. In October 1989, Andrews approached James Gasper, the Trust's attorney, with questions about the propriety of Williams' travel expenses and reimbursement. The following day, Gasper informed Williams of Andrews' inquiry. Andrews alleges that shortly thereafter, Williams agreed that he should be fired. On October 31, Andrews was given notice of his immediate termination.

In March 1991 Andrews filed a complaint in the superior court based upon his termination. Count I of the complaint alleged that Andrews "was terminated in order to prevent him from giving information and testifying about the possible misuse of Trust funds" in violation of the "express public policy of the State of Alaska and the United States of America." Count II alleged that "[t]he Trust breached the covenant of good faith and fair dealing by firing plaintiff for reporting possible misuse of Trust funds."

The Trust filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Andrews' claims were preempted by ERISA and subject to the exclusive jurisdiction of the federal district courts. After briefing and oral argument, the superior

court granted the Trust's motion as to all claims. This appeal followed.

DISCUSSION

A. Standard of Review

The issue presented by this appeal is whether the superior court had subject matter jurisdiction over Andrews' claims. This is a question of law, subject to de novo review by this court. Under this standard, we will independently review the matter and adopt the rule that is most persuasive in light of precedent, policy, and reason. Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

B. ERISA Preemption

Section 514(a) of ERISA provides that "the provisions of this subchapter . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit

plan described in section 1003(a) of this title. . . ." 29 U.S. C. § 1144(a) (1988). Under the Act, the term "State law" refers to "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." Id. at § 1144(c).

The United States Supreme Court interpreted this provision in Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990). In Ingersoll-Rand, the employee brought a wrongful discharge action under various state law contract and tort theories, alleging that the principal reason for his termination was his employer's desire to avoid contributing to his pension fund. Id. at 135-36. The employer responded by claiming that the suit was preempted by ERISA.

Construing § 514(a) of the Act, the Court stated that "'[t]he pre-emption

clause is conspicuous for its breach.' . . . Its 'deliberately expansive' language was 'designed to establish pension plan regulation as exclusively a federal concern.'" Id. at 138 (quoting FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990) and Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987)); see also Tingey v. Pixley-Richards West, Inc., 953 F. 2d 1124, 1130 (9th Cir. 1992) ("ERISA's preemption clause . . . is to be read expansively."). The Court further noted that "[t]he key to § 514(a) is found in the words 'relate to.'"

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. . . . Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the

> law is not specifically designed to affect such plans, or the effect is only indirect.

Ingersoll-Rand, 498 U.S. at 139 (citing Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983) and Pilot Life, 481 U.S. at 47).

Based upon this broad interpretation, the Court held that the employee's claim for wrongful discharge was preempted by ERISA. The Court noted that "the existence of a pension plan [was] a critical factor" in establishing the employer's liability under the state wrongful discharge law. Id. at 139-40. Thus, the Court concluded that the cause of action clearly "relate[d] to an ERISA-covered plan within the meaning of § 514(a)." Id. at 140.

C. Preemption of Andrews' Public Policy Claim

Andrews' complaint alleges that his "employment was terminated in order to prevent him from giving information and testifying about the possible misuse of Trust funds." The complaint further alleges that discharge on this basis "violate[s] the express public policy of the State of Alaska and the United States of America." Andrews argues that this claim is not preempted by ERISA since the claim does not require an interpretation of the underlying benefit plan, and that the public policy allegedly violated does not arise solely from ERISA.

Courts addressing ERISA preemption in this context have uniformly held that state law retaliatory discharge and whistleblower [sic] claims based on alleged violations of public policy "relate to" ERISA plans and are thus preempted. For example, in Hashimoto v.

Bank of Hawaii, 999 F.2d 408 (9th Cir. 1993), the court addressed ERISA's preemptive effect on a state wrongful termination action alleging a violation of Hawaii's Whistle Blowers' Protection Act.[1] In Hashimoto, the employee complained to her superiors abut[sic] "potential and/or actual violations . . . of the reporting and disclosure requirements and fiduciary standards of ERISA." 999 F.2d at 409. She contended that "but for her objections she would not have been discharged from employment." Id. at 410.

The United States Court of Appeals for the Ninth Circuit, citing Ingersoll-Rand, noted the considerable

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[1] In Hashimoto, the employee did not expressly base her suit on an alleged violation of "public policy." However, Hawaii's Whistle Blowers' Protection Act may be viewed as a codification of the state's public policy against termination based upon the reporting of a suspected violation of the law. Thus, Hashimoto and other whistle blower act cases are analogous to the instant case.

breadth of ERISA preemption. Id. at 410-11. The court stated:

> [A] trial of Hashimoto's claim would require an interpretation of the ERISA plans as to which she raised her objections about the Bank's fulfillment of its fiduciary obligations. Even though such examination by the court would only have to proceed to the point of determining Hashimoto's good faith, some interpretation of ERISA would probably be required.

Id. at 411. Based on this analysis, the court concluded that the claim was sufficiently "related to" an ERISA benefit plan to be preempted. Id. at 411-412.

Similarly, in McLean v. Carlson Cos., 777 F. Supp. 1480 (D. Minn. 1991), the employee claimed that she was

discharged in retaliation for reporting to her superiors violations of ERISA in connection with the administration of an employee benefit plan. Id. at 1481. The court held the claim, which arose out of a state whistle blower statute, to be preempted. In concluding that the claim "related to" an ERISA plan, the court stated:

> To prove her claim [under state law], plaintiff must demonstrate that she reported violations of law "in good faith." To the extent plaintiff reported violations of ERISA, plaintiff must describe the conduct she perceived to be violative of ERISA with reference to the ERISA provisions which the conduct purportedly contravened. . . . Plaintiff's claim refers to the plan and depends upon its existence. Further, to the extent it depends upon reported

> violations of ERISA, plaintiffs' state law claim would provide a remedy for conduct arising, albeit indirectly, out of the administration of an ERISA plan.

Id. at 1483 (footnote omitted) (citing Ingersoll-Rand, 498 U.S. at 140).

The court reached a similar conclusion in Authier v. Ginsberg, 757 F.2d 796 (6th Cir. 1985), cert. denied, 474 U.S. 888 (1985). In Authier, the co-administrator of an ERISA profit-sharing plan filed a state law claim for discharge in violation of public policy. Id. at 798. He alleged that he was terminated in retaliation for sending a letter to his co-administrators and the plan's participants expressing concerns regarding the implementation of proposed changes to the plan. Id. He argued that he was obligated under ERISA to inform

his co-fiduciaries and the participants of the potential problems. Id.

The court held the claim preempted. Id. at 800. Although the court noted that the cause of action was "predicated technically upon the [state] common-law cause of action for discharged in contravention of public policy," it concluded that "as applied in this case, the action relates to an ERISA pension plan." Id. The court based its holding on the fact that ERISA created the public policy element at issue and that the action turned upon a fiduciary's duties under ERISA. Id.; see also Maxfield v. Central States, Southeast & Southwest Areas Health, Welfare & Pension Funds, 559 F. Supp. 158, 160-62 (N.D. Ill. 1982) (holding a whistleblower [sic] claim alleging violations of ERISA and the

public policy of Illinois to be preempted by ERISA).

In addition to finding that state law causes of action in this context are "related to" ERISA plans for preemption purposes, the cases discussed above also relied upon the fact that ERISA provides a remedy for such claims. See Hashimoto, 999 F.2d at 411-12; Tingey, 953 F. Supp. at 160. ERISA section 510 states, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter . . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. § 1140 (1988). Section 502(a)(3) provides that a civil action may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3) (1988).[2]

In Hashimoto, the court determined that §§ 502 and 510 of ERISA "may be fairly construed to protect a person in Hashimoto's position if, in fact, she was fired because she was protesting a violation of law in

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[2] Section 502(e)(1) further provides that "the district courts of the United States shall have exclusive jurisdiction" over such actions. 29 U.S.C. § 1132(e)(1) (1988).

connection with an ERISA plan." 999 F.2d at 411. Based on this finding, the court held that, to the extent an ERISA violation was involved, the specific provisions of ERISA protecting whistle blowers preempted application of the state whistle blowers act. Id. at 412. The court further concluded that "[b]ecause the preemption is total, what appeared on its face to be a state cause of action is in fact a federal cause of action and must be recharacterized as such." Id.

Similarly, in Maxfield, the court concluded that the plaintiff's action for discharge in contravention of state public policy was preempted, "because 29 U.S.C. §§ 1132 and 1140 expressly provide a remedy for this wrong. ERISA's broad remedial policy coupled with its express preemption

provisions indicate that Congress intended to occupy the field of employee benefit plans." 559 F.Supp. at 160; see also Ingersoll-Rand, 498 U.S. at 145 ("'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected' by § 510 of ERISA,' due regard for the federal enactment requires that state jurisdiction must yield.'") (citation omitted); Tingey, 953 F.2d at 1130-31 ("ERISA preempts state law causes of action that offer remedies for the violation of rights expressly guaranteed by ERISA and exclusively enforced by ERISA's civil enforcement mechanism, and exclusively enforced by ERISA's civil enforcement mechanism, § 502(a)."); Felton v. Unisource Corp., 940 F.2d 503, 509 (9th Cir. 1991) (quoting Ingersoll-Rand).

In Authier, the court discussed the rationale behind the rule that state retaliatory discharge and whistle blower claims are preempted by the "comprehensive enforcement scheme" provided by ERISA. 757 F.2d at 801.

> Allowing a fiduciary to bring a state law cause of action for retaliatory discharge, as in the present case, will create inconsistency in the enforcement of ERISA. Initially, since all states do not recognize such an action, the recourse for a terminated ERISA fiduciary will depend upon the fortuity of the location of his employment. Moreover, even in the states which do recognize an action in a fiduciary's favor, the state courts will have to define both the scope of a fiduciary's duties under ERISA and the available remedies. Clearly, allowing the remedies

> available to an ERISA fiduciary discharged for complying with ERISA to turn upon the state of his employment and a state court's interpretation of ERISA's provisions runs contrary to Congress' desire to establish a uniform federal law regulating pension plans.

Id. at 802 (footnote omitted).

Based on the above authorities, we conclude that Andrews' claim for wrongful discharge in contravention of the public policy of the State of Alaska is preempted by ERISA. Andrews' action clearly "relates to" an employee benefit plan under § 514 of ERISA. 29 U.S.C. § 1144(a) (1988). By alleging that he was fired "in order to prevent him from giving information and testifying about the possible misuse of Trust funds." Andrews expressly ties his claim to the existence of the Trust. Since it is

undisputed that the Trust is governed by ERISA, Andrews' claim necessarily refers to and depends upon an ERISA benefit plan. See McLean, 777 F. Supp. at 1483. In addition, ERISA creates and codifies the public policy element of Andrews' action. Authier, 757 F.2d at 800; see also Ingersoll-Rand, 498 U.S. at 140 (to prevail, plaintiff must establish that employer had pension-defeating motive in terminating her employment). A trial of Andrews' claim would require the interpretation of a fiduciary's obligations under ERISA.[3] See Hashimoto, 999 F.2d at 411; Authier, 757 F.2d at 800, 802; McLean, 777 F.Supp. at 1483. Finally, Andrews'' claim would "provide a remedy for conduct arising, albeit indirectly, out of the

[3] The provisions governing fiduciary duties under ERISA are found at 29 U.S.C. §§ 1101-14 (1988).

administration of an ERISA plan." McLean, 777 F. Supp. at 1483.

In addition, ERISA provides the exclusive remedy for the wrong alleged by Andrews. As a fiduciary,[4] Andrews is authorized under § 502(a) to bring a civil action in federal district court to enforce ERISA's retaliatory discharge provision. See 29 U.S.C. §§ 1132, 1140 (1988).

Andrews' arguments that preemption is inappropriate with respect to his public policy claim are unpersuasive. He cites two Ninth Circuit cases which suggest that state law claims

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[4] Section 3(21)(a) of ERISA, 29 U.S.C. § 1002(21)(a) (1988), defines fiduciary as one who "(I) . . . exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) . . . has any discretionary authority or discretionary responsibility in the administration of such plan." Under this broad definition, Andrews clearly qualifies as a fiduciary with respect to the Trust. See Hashimoto, 999 F.2d at 411 (agents of trustee are fiduciaries under § 1002 (21)(a).

arising out of a plan's status as an employer are not subject to preemption. However, both cases are distinguishable from the instant situation.

In General American Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1521 (9th Cir. 1993), the court discussed ERISA preemption in terms of the "relationships" regulated by the statute. The court stated that "ERISA doesn't purport to regulate those relationships where a plan operates like any other commercial entity--for instance, the relationship between the plan and its own employees . . . . State law is allowed to govern these relationships, because it's much less likely to disrupt the ERISA scheme than in other situations." Id. at 1522.

In the present case, however, Andrews' claim does not arise from a

relationship in which the Trust operates "like any other commercial entity." The claim is based on, and arises directly out of, alleged misuse of ERISA trust funds. As discussed above, a state cause of action such as this one would in fact implicate the duties and requirements of ERISA, and therefore raise the danger of disrupting the ERISA scheme.

Andrews also cites Lane v. Goren, 743 F.2d 1337 (9th Cir. 1984), in support of his argument that ERISA does not preempt state claims arising out of a plan's status as employer. In Lane, the court held that a state employment discrimination claim against an ERISA benefit plan was not preempted. Id. at 1340. The court concluded that the state law claim applied to the plan "in its capacity as an employer, and in a way that all other employers are affected.

It simply cannot be said that state law which prohibits dismissal of an employee because of race "relate[s] to,' 'has a connection with' or 'reference to' [sic] an employee benefit plan under these circumstances." Id.

Lane is also distinguishable from the instant case. Unlike Andrews' claim, the discrimination claim presented in Lane did not involve or require the interpretation of the fiduciary requirements of ERISA, nor was it suggested that ERISA itself provided a remedy for the discrimination alleged. In this case, however, the substance of Andrews' action is clearly remediable under §§ 502 and 510 of ERISA. Additionally, we find Hashimoto to be controlling in the present case. Hashimoto clearly contemplates the preemption of a state law wrongful

discharge claim in the context presented here.

Andrews also cites a decision of this court in support of his argument. In Alaska State Council of Carpenters v. United Brotherhood of Carpenters, Local 1281, 727 P.2d 306 (Alaska 1986), we concluded that a state action relating to the selection of the trustees of an ERISA benefit plan was not preempted. In reaching this conclusion, we recognized that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to' a plan." Id. at 309 (quoting Shaw v. Delta Air Lines, 463 U.S. 85, 100 n. 21 (1983)). We also noted that "the state law at issue--contract law and the law governing the functioning of

organizations--is traditionally a field left to the states." Id. at 310.

The analysis in Carpenters is an applicable to the present case. In Carpenters, this court expressly stated that the fiduciary duties created by ERISA were not at issue. id. We distinguished Authier on the grounds that the case "required an interpretation of the duties created by ERISA--clearly a federal matter." Id. The present case is distinguishable from Carpenters on the same grounds, since Andrews' claim of "misuse" of trust funds requires an interpretation of the uses permitted under ERISA. In addition, we further noted in Carpenters that "ERISA preempts state law wherever state law has an impact on the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement." Id. at 309. Clearly,

Andrews' claim has an impact on the enforcement of rights protected by ERISA and should therefore be preempted.[5]

Based on the above analysis, we affirm the lower court's order dismissing Andrews' claim that his termination contravened the public policy of the State of Alaska. This claim is preempted by ERISA and is subject to the exclusive

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[5] Andrews suggests that § 510 of ERISA is not implicated in this case, since his retaliatory discharge claim is based on an internal report, not a report to a public body. Andrews asserts that "ERISA does not provide a remedy" for such action. However, both Hashimoto and McLean clearly hold that discharge in retaliation for a report made internally is actionable under ERISA. In Hashimoto, the court held that § 510 of ERISA protects a person who is fired for complaining to her superiors about potential ERISA violations. The court, in reaching this conclusion, stated that "[t]he normal first step in giving information or testifying . . . would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at is start: the anticipatory discharge discourages the whistle blower before the whistle is blown." Hashimoto, 999 F.2d at 410-11. See also McLean, 777 F. Supp. at 1484 ("[I]t would seem anomalous for the court to prohibit actions by plaintiffs who allege to have been discharged for reporting violations of ERISA to their employers while concurrently permitting actions by those who seek to remedy the same violations through legal action.").

jurisdiction of the federal district courts.

D. Preemption of Andrews' Good Faith and Fair Dealing Claim

Andrews' complaint also alleges that "[t]he Trust breached the covenant of good faith and fair dealing should not have been dismissed.

In support of this argument, Andrews relies on cases which have held some claims to be preempted by ERISA, while allowing other state law claims to survive. For example, in Sorosky v. Burroughs Corp., 826 F.2d 794 (9th Cir. 1987), the employee brought several state law actions against his employer, including wrongful discharge, breach of the implied convenant of good faith and fair dealing, conspiracy to interfere with protected property rights, and age discrimination. Id. at 798. These claims were based on several different

theories. First, he alleged that his employer sought to prevent him from acquiring retirement benefits under an ERISA plan. Id. at 800. In the alternative, he alleged that he was fired without good cause. Id. At trial, the employer removed the case to federal district court, which granted summary judgment in favor of the employer. Id. at 798.

On appeal, the court affirmed in part and reversed in part. Id. Addressing ERISA preemption, the court noted that the employee had a federal claim under ERISA to enforce his right to the retirement benefits provided by the benefit plan. Id. at 800. Therefore, the court found that his state law claims were preempted "to the extent that [they] refer[red] to the employee benefit plan." The court further held that the claims

for wrongful termination and breach of the implied convenant of good faith and fair dealing were not preempted to the extent they relied on "theories independent of the benefit plan." Id.

In Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124 (9th Cir. 1992), a wrongful discharge case involving an alleged motive to interfere with ERISA-protected insurance benefits, the court stated that "ERISA preemption of an employee's action for wrongful termination, breach of employment contract, or the like turns on the employee's theory of why the termination occurred." Id. at 1131 (footnote omitted). Discussing ERISA's application to the employee's claims, the court concluded:

> [I]t might be argued that Tinguey would have an action for breach of employment

> contract with or without the existence of a benefit plan. Arguably, Tingey's contract cause of action does not "make specific reference to," nor is it "remised on," the existence of a benefits plan . . . and therefore it should not be preempted. As will be shown, however, this argument fails. So long as Tingey's underlying theory of the case revolves around the denial of benefits, his claim falls under ERISA's far-reaching preemption clause.

Id. at 1131 n.2 (emphasis added) (citing Ingersoll-Rand, 498 U.S. at 140.

In the present case, the underlying theory supporting Andrews' claim for breach of good faith and fair dealing is that he was fired for reporting possible misuse of ERISA trust funds. For the same reasons discussed above regarding Andrews' public policy

claim, this cause of action also "relates to" ERISA and is thus preempted. See Tingey, 953 F.2d at 1131 N.2; Sorosky, 826 F.2d at 800 (claims preempted to the extent they rely on theories implicated by ERISA). Therefore, we affirm the trial court's dismissal of Andrews' second claim for lack of subject matter jurisdiction.

CONCLUSION

Precedent clearly establishes that Andrews' causes of action for discharge in violation of public policy and for breach of the covenant of good faith and fair dealing are preempted by ERISA. The underlying theory supporting both of these claims is that Andrews was terminated for reporting possible misuse of an ERISA benefit plan's funds. As discussed in Hashimoto and other cases, these claims "relate to" an employee

benefit plan and are remediable under ERISA's comprehensive regulatory scheme. Therefore, preemption is proper and complete. We therefore AFFIRM the trial court's order dismissing Andrews' state law claims for lack of subject matter jurisdiction.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD B. ANDREWS,
Petitioner,

v.

ALASKA OPERATING ENGINEERS-EMPLOYERS TRAINING TRUST FUND,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW:

Did the Alaska Supreme Court err in determining that petitioner's state law claims for wrongful discharge were preempted by ERISA, where the claims in question arose from dispute between co-fiduciaries of an ERISA plan over a matter of plan administration, relationships between such co-fiduciaries are extensively regulated by ERISA, the claims were premised on the existence of an ERISA plan, resolution of the merits of the claims would require interpretation and application of substantive provisions of ERISA and the governing trust agreement, and the claims are expressly covered, and a remedy provided, by Section 510 of ERISA?

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STATUTES INVOLVED

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A):

> ...a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets...or (iii) he has any discretionary authority or discretionary responsibility or discretionary responsibility in the administration of such plan.

ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A):

> ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(A) for the exclusive purpose of: (i) providing benefits to participants and beneficiaries; and (ii) defraying reasonable expenses of administering the plan...

Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D):

> ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I and Title IV of ERISA].

ERISA Section 406(a)(1), 29 U.S.C. § 1106(a)(1):

> Except as provided in section 408: (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--(A) sale or exchange, or leasing, of any property between the plan

> and a party in interest; (B) lending of money or other extension of credit between the plan and a party in interest; (C) furnishing of goods, services, or facilities between the plan and a party in interest; [or] (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan...

ERISA Section 408(c), 29 U.S.C. § 1108(c):

> Nothing in section 406 shall be construed to prevent a fiduciary from--...(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan...

Section 502(a) of ERISA, 29 U.S.C. § 1132(a):

> A civil action may be brought...by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1):

> Except for actions under subsection (a)(1)(B) of this section, [relating to actions for plan benefits] the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary [of Labor] or by a participant, beneficiary or fiduciary...

Section 510 of ERISA, 29 U.S.C. § 1140:

> ...It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given information or has testified or is

about to testify in any inquiry or proceeding relating to this Act...The provisions of section 502 shall be applicable in the enforcement of this section.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a):

...the provisions of [Titles I and IV of ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...

I. STATEMENT OF THE CASE

Respondent Trust is a collectively bargained, joint labor-management trust fund created and administered under Section 302(c)(5) of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act), 29 U.S.C. § 186(c)(5). It is also an "employee welfare benefit plan" as defined in Section 3(1) of the Employee Retirement Income Security Act of 1974 as amended (ERISA), 29 U.S.C. §1002(1), and subject to coverage under ERISA by virtue of ERISA Section 4(a), 29 U.S.C. § 1003(a). The Trust provides job-related training to apprentices and journeymen represented by the participating local union.[1]

The Trust is governed by an Agreement and Declaration of Trust (the Trust Agreement), which authorizes the trustees to employ administrative agents and other necessary personnel, and to delegate to such persons "any of their rights, powers, duties and responsibilities with respect to the Trust fund and the administration of the [training] plan." The Trust

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[1] Appendix A to Petition, p. 3.

Agreement further provides, however, that: "Any such... delegation...shall be terminable upon such notice as the Trustees in their sole discretion deem reasonable and prudent under the circumstances."[2]

Petitioner Ronald Andrews was employed as the administrative manager of the Trust and, in that capacity, exercised sufficient discretionary authority to qualify as a fiduciary with respect to the Trust, as defined in Section 3(21)(a) of ERISA, 29 U.S.C. § 1002(21)(a).[3] He was authorized to sign checks on behalf of the Trust, but that authority was limited by an express provision of the Trust Agreement. One of the Trust's defenses on the merits of Andrews' wrongful discharge claims is that Andrews breached his fiduciary duty by signing checks for much higher amounts than permitted by the Trust Agreement, and that those breaches constituted absolute grounds for termination under ERISA Section 409(a), 29 U.S.C. § 1009(a).[4] Another defense on the merits is that the

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[2] Appendix A hereto, at p. 2.
[3] Appendix A to Petition, pp. 3, 4 and 23.
[4] Appendix A hereto, pp. 3, 4, and 10.

above-quoted provision of the Trust Agreement permitting the trustees to terminate any delegation of authority "in their sole discretion" overrides any implied covenant or contract under state law, as between ERISA co-fiduciaries.

Andrews was terminated from his position as administrative manager in October, 1989. He alleged in Count I of his complaint that he was terminated "in order to prevent him from giving information and testifying about the possible misuse of Trust funds," and in Count II that he was fired "for reporting possible misuse of Trust funds."[5] The "possible misuse of Trust funds" referred to in the complaint involved the reimbursement of a trustee's expenses for attending a Trust meeting. Andrews suspected that the reimbursement had been improper and reported his suspicion to an ERISA investigator for the U.S. Department of Labor, as well as the Trust's attorney, shortly before the formal vote to terminate his

[5] Appendix A to Petition, p. 5.

services.[6]

The circumstances under which an ERISA trustee may be properly reimbursed for expenses are set forth in ERISA Sections 404, 406 and 408, 29 U.S.C. §§ 1104, 1106 and 1108, and the regulations thereunder. Thus, any determination as to whether the reimbursement paid in this case constituted a "misuse of Trust funds," or could reasonably have been considered or suspected as such, would require interpretation and application of those provisions.

The Alaska Supreme Court found Andrews' state law claims preempted by ERISA after carefully considering the distinctions between this case and other cases in which an ERISA trust may operate "like any other commercial entity."[7] The claims asserted in Andrews' pending federal suit are virtually identical to those asserted here.

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[6] Appendix A hereto, pp. 7 and 8. There is a factual dispute as to whether any of the trustees were aware of the questions raised by Andrews or his contact with the DOL investigator at the time the vote was taken. The courts below based their decisions on the allegations of the complaint and Andrews' deposition testimony, without attempting to determine their veracity, and the same approach is appropriate here.

[7] Appendix A to Petition, pp. 24 and 25.

II. ARGUMENT

A. There are no "Special and Important Reasons" to grant Certiorari in this Case, as Required by Rule 10.1.

This case turns on a unique set of facts and relationships, including the following:

1. Andrews' status as a fiduciary with respect to the Trust, and the fact that relationships between and among co-fiduciaries and between fiduciaries and the plans themselves are extensively regulated by ERISA.

2. The fact that both of Andrews' state law claims are predicated on the existence of an ERISA trust and the reporting of or threat to report a possible "misuse of Trust funds."

3. The need to interpret and apply substantive provisions of ERISA in order to determine whether a "misuse of Trust funds" occurred or could reasonably have been thought to have occurred.

4. The need to interpret and apply provisions of the governing Trust Agreement and ERISA Section 404(a)

(1)(D), 29 U.S.C. § 1004(a)(1)(D), requiring adherence to such documents by plan fiduciaries, in order to adjudicate the Trust's defenses on the merits.

5. The Alaska Supreme Court's finding that the "public policy" element of Andrews' state law claims is codified in ERISA.[8]

6. The fact that Andrews' claims are expressly covered and governed by Section 510 of ERISA, 29 U.S.C. § 1140, which provides a remedy for such claims.

There have been no reported cases since the enactment of ERISA, nearly twenty years ago, involving this unique combination of facts and relationships. The decisions of the courts below will not affect the ordinary employment relationships between ERISA plans and their non-fiduciary employees, nor will they provide any special protection for such plans if the plans are truly operating "like any other commercial entity" in areas outside the ambit of ERISA regulation. The likelihood that the decisions below will have

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[8] *Id.*, p. 22.

an "important" or even significant impact on other relationships between ERISA plans and their employees--even those who are fiduciaries--is extremely remote.

This Court has already addressed the pivotal issue in this case; i.e., that Andrews' claims are covered, and a remedy provided, by Sections 510 and 502(a) of ERISA. Section 510, 29 U.S.C. § 1140, states:

> ...It shall be unlawful for any person to discharge...any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA]...The provisions of section 502 shall be applicable in the enforcement of this section.

ERISA Section 502(a), 29 U.S.C. § 1132(a) provides in turn that:

> A civil action may be brought...by a...fiduciary (A) to enjoin any act or practice which violates any provision of [Title I of ERISA, which includes Section 510]...or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of [Title I]...

This Court held in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) that:

> ...Congress intended [ERISA] § 502(a) to be the exclusive remedy for rights guaranteed by ERISA, including those provided by § 510...
>
> * * *
>
> ...we hold that "'when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected" by § 510 of ERISA, "due regard for the federal enactment requires that state jurisdiction must yield.'" [Citation omitted.]

498 U.S. at 144 and 145.

Since this case turns on a unique combination of facts and relationships unlikely to be present in any other case, and since the pivotal issue has already been decided by this Court, there are no special or important reasons to grant certiorari here.

B. <u>There are no Conflicts between the Alaska Supreme Court's Decision Here and Decisions of Other State Courts of Last Resort or United States Appellate Courts</u>.

Andrews argues that the opinion of the Alaska Supreme Court is in conflict with the following decisions by other courts: *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989); *Ethridge v. Harbor House Restaurant*, 861 F.2d

1389 (9th Cir. 1988); *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987); *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984); *Pace v. Signal Technology Corp.*, 417 Mass. 154, 628 N.E.2d 20 (Mass. 1994); and *Cutler v. Phillips Petroleum Co.*, 71 Wash.App. 511, 859 P.2d 1251 (Wash.App. 1993).[9] All of those cases, however, are distinguishable from the instant case on one or more of the grounds identified in Part II.A, above.

None of the cases cited except *Sorosky, supra,* involved claims cognizable under ERISA Section 510, and the Section 510 claim in *Sorosky* was held preempted. None of the cited cases required interpretation or application of the fiduciary responsibility provisions of ERISA or of the governing plan document, nor did any involve relationships among ERISA co-fiduciaries or public policies codified in ERISA. Further, the Ninth Circuit's decision in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), cited extensively and followed in the opinion below, eliminated any possible suggestion of a conflict

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[9] The Washington Court of Appeals is not a court of last resort.

between earlier decisions of that court and the Alaska Supreme Court's decision here.

C. **The Decision Below was Correct.**

The decision of the Alaska Supreme Court was fully consistent with *Ingersoll-Rand Co. v. McClendon, supra,* and other decisions of this Court, and with the lower court decisions in analogous cases. *Ingersoll-Rand* held quite clearly that ERISA preempts state law claims within the ambit of ERISA Section 510, and that holding is dispositive here. Moreover, *Hashimoto v. Bank of Hawaii, supra, Anderson v. Electronic Data Systems,* 11 F.3d 1311 (5th Cir. 1994), *cert. petition filed* April 25, 1994, *McClean v. Carlson Cos.*, 777 F.Supp. 1480 (D. Minn. 1991) and *Maxfield v. Central States, Southeast and Southwest Areas Health, Welfare and Pension Funds,* 559 F.Supp. 158 (N.D. Ill. 1982), the only "whistleblower" cases cited by either party, all held the state law claims in question preempted by ERISA, based on the same established principles and analysis applied by the Alaska Supreme Court in this case.

The decision below is supported by the clear weight of authority in ERISA preemption cases and by unanimous authority in cases dealing specifically with ERISA preemption of state law "whistleblower" claims cognizable under ERISA Section 510. Even if certiorari were routinely granted for the sole purpose of correcting errors by the lower courts, there would be no reason to grant it here.

III. CONCLUSION

Petitioner has failed to demonstrate that the decision below conflicts with any decision of this Court, another state court of last resort or a United States court of appeals. He has also failed to demonstrate that the decision below was in error, or that there are any special or important reasons to grant certiorari in this case. The petition should therefore be denied.

Respectfully submitted this first day August, 1994.

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APPENDIX A
TO
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EXCERPTS FROM RESPONDENT'S BRIEF TO THE SUPREME COURT OF THE STATE OF ALASKA

by Local No. 302 of the International Union of Operating Engineers. The purpose of the Trust is to provide job-related training to apprentices and journeymen represented by Local No. 32. R.11, ¶2.

This Trust is governed by an Agreement and Declaration of Trust (the Trust Agreement), which authorizes the Trustees to employ administrative agents and other necessary personnel, and to delegate to such persons "any of their rights, powers, duties and responsibilities with respect to the Trust fund and the administration of the [training] plan." R.11, ¶3; R.24, Art. IV, § 10; R.31, Art. VI, § 4(a). The Trust Agreement further provides, however, that: "Any such...delegation... shall be terminable upon such notice as the Trustees in their sole discretion deem reasonable and prudent under the circumstances." *Id.*

B. Andrews' Employment and Fiduciary Status

Plaintiff/appellant Andrews was originally employed by the Trust as a "Field Coordinator" and promoted to "Administrative Manager" in May, 1986. R.51, l.3 - R.56, l.11.

As Administrative Manager, he was responsible for dispatching the apprentices to the jobsites and monitoring their performance, and had the authority to remove them from the job for disciplinary reasons. R.51, ll.3-17; R.59, l.22 - R.60, l.10; R.72, ll.20-24. He also participated in the recruitment and selection of the apprentices, including the scoring of the applications and interviews which determined which candidates would be admitted to the program. R.66, l.8 - R.71, l.1.

When Andrews assumed the position of Administrative Manager he became the supervisor of the remaining Field Coordinator and the Trust's only clerical employee. R.57, l.14 - R.58, l.13. In 1989, the clerical employee gave herself an unauthorized raise and the Chairman of the Board of Trustees suggested that she be fired, but Andrews made a decision not to fire her. R.73, ll.15-21; R.75, l.25 - R.81, l.21.

Andrews also had and exercised the authority to direct the transfer of funds from the Trust's investment manager to the checking account, which he controlled. There was no limit

on the amount of funds he was allowed to transfer. R.64, l.11 - R.66, l.7. Checks were normally required to have two signatures, but could be issued by Andrews himself through the use of a signature stamp. R.61, l.10 - R.62, l.14. Andrews was authorized to, and did, sign checks up to $5,000 pursuant to the following provisions of the Trust Agreement:

> All checks, drafts, vouchers or other withdrawals of money from the Fund shall be authorized in writing or countersigned by at least one Employer Trustee and one Employee Trustee, with the exception that payroll checks, employment taxes and other normal expenditures may be authorized by the signature of one Trustee and the signature of the Administrative Manager or the Administrative Manager's designee. This exception shall not apply to the purchase of equipment or training expenditures to exceed the sum of five thousand dollars ($5,000.00) for any one expenditure.

R.62, l.19 - R.64, l.5; R.11, ¶3; R.27, Art. IV, § 16.

Notwithstanding the express limitation in the Trust Agreement, Andrews also signed at least two checks for large equipment purchases--one in the amount of $60,000. R.74, ll.4-20.

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), provides in part that:

> ...a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets...or (iii) he has any discretionary authority to discretionary responsibility in the administration of such plan...

Consequently, both Andrews and the Trustees were "fiduciaries" as defined by ERISA and subject to the requirements of that statute.

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1) also provides in part that:

> ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I and Title IV of ERISA].

One of the issues to be resolved if this case should reach the merits is whether Andrews' failure to comply with the "co-signature" requirement of the Trust Agreement--which was

one of the reasons for his termination--violated ERISA § 404(a)(1)(D).

C. Andrews' Claim

Andrews makes two basic claims in this lawsuit. Both are predicated on alleged violations of ERISA by Trustee George Williams.

Count I of the Complaint alleges that Andrews "found documents" indicating that Williams may have charged the Trust twice for the same Trust expenses or for non-trust related expenses, and the "misuse of Trust funds" is a violation of ERISA. Count I alleges further that Andrews' employment as Administrative Manager was terminated "in order to prevent him from giving information and testifying about the possible misuse of Trust funds," and that said termination violates the express public policy of the State of Alaska and the United States. R.2&3, ¶¶5, 6, 8 and 9.

Count II of the Complaint realleges the claims regarding Williams' purported misuse of Trust funds, and asserts that "the Trust breached the covenant of good faith and fair dealing

by firing plaintiff for reporting possible misuse of Trust funds." R.3, ¶¶11 and 14.

Andrews reiterates in this Court that:[1]

> The central issue in plaintiff's complaint is that Mr. Williams had a duty not to misuse trust funds.

Andrews testified by deposition that the alleged "misuse of Trust funds" by Williams consisted of his receipt of reimbursement for an airline ticket purchased for his attendance at the Trust meeting in Washington state in May, 1986. R.82, l.2-86, l.21; R.87, l.4-96, l.6; R.106, l.24-108, l.12. (The Trust acknowledged in the trial court that Williams did exchange that particular ticket for cash, but also advised the trial court that Williams did attend the meeting in question and never charged the Trust for his travel from Alaska to Seattle and return. Thus, on the merits, the Trust denies that Williams ever received double reimbursement for the trip, or that he ever charged the Trust for "non-trust related expenses." R.115 and 116.)

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[1] Appellant's Opening Brief, p.12, N.9.

Andrews further testified that he was given various documents relating to the travel expenses in question by the Trust's clerical employee and discussed the contents of those documents with Williams himself, the Trust attorney and an ERISA investigator for the U.S. Department of Labor shortly before his employment was terminated. R.82, l.2-86, l.21; R.87, l.4-91, l.18; R.96, l.7-102, l.19.

Transactions between an ERISA trust fund and its trustees and other fiduciaries and "parties in interest" are expressly governed by ERISA Sections 404, 406 and 408, 29 U.S.C. §§ 1104, 1106 and 1108.[2]

ERISA Section 404(a)(1) provides that:

> ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(A) for the exclusive purpose of: (i) providing benefits to participants and beneficiaries; and (ii) defraying reasonable expenses of administering the plan...

ERISA Section 406(a) provides that:

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[2] Trustees and othe fiduciaries are "parties in interest" as defined in ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A).

from that position by the Trustees of the plan, who were also fiduciaries. See Part II.B., *supra*, and record references cited therein.

Alaska state law does recognize a claim for relief for "retaliatory discharge" as part of an "implied covenant of good faith" except to the common law "at will" employment doctrine. *See, e.g., Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990). In order to prevail on such a claim, however, the plaintiff must prove, *inter alia*, that the discharge violates "public policy" in that the retaliatory motive strikes "at the heart of a citizen's social rights, duties, and responsibilities." *Leudtke v. Nabors Ala. Drilling, Inc. (Leudtke I)*, 763 P.2d 1123, 1132 (Alaska 1989) (citing *Palmateer v. International Harvester*, 85 Ill.2d 124 (1981)). The "public policy" and "rights, duties and responsibilities" involved in this case are all expressly codified in ERISA.

Andrews would also have to prove, in order to prevail on either of his state law claims, that his termination was based on a motive that was both retaliatory and improper, or that the

Trustees' exercise of their discretion was in some way unreasonable or unfair. *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 199 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 2014 (1991); *Leudtke I, supra; Leudtke v. Nabors Alaska Drilling, Inc. (Leudtke II)*, 834 P.2d 1220 (Alaska 1992). A finding that Andrews had breached his fiduciary duties under ERISA would provide an absolute defense under either formulation. ERISA § 409(a), 29 U.S.C. § 1109(a); *Marshall v. Kelly*, 465 F.Supp. 341 (W.D. Okla. 1978); *Marshall v. Snyder*, ___F.Supp.___, 1 Employee Benefit Cases (EBC) 1878 (E.D. N.Y. 1979). Further, even if it were shown that Andrews' complaints about Williams' expenses had been a factor in his termination (which the Trust denies), the reasonableness or unreasonableness of those complaints would have to be considered in evaluating the reasonableness of the Trustees' response. *Hashimoto, supra.* And as shown, the reasonableness of Andrews' complaints against Williams depends entirely on the provisions of and interrelationships among ERISA §§ 404, 406 and 408. See Part II.C, *supra*, and record references cited therein.

(3)

Supreme Court, U.S.
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EMPLOYERS TRAINING TRUST FUND,
Respondent.

On Petition For Writ Of Certiorari
To The Alaska Supreme Court

PETITIONER'S REPLY BRIEF

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NO 94 - 185

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RONALD B. ANDREWS,
Petitioner,

v.

ALASKA OPERATING ENGINEERS-
EMPLOYERS TRAINING TRUST FUND,
Respondent.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner, Ronald Andrews, seeks review by this Court to redress an erroneous decision by the Alaska Supreme Court that dismissed his state lawsuit for wrongful discharge. Respondent

opposes this petition essentially on the merits of the case. Respondent misstates the nature of Andrews' case concluding that it requires an interpretation of the Employment Retirement Income Security Act of 1974 ("ERISA") Pub. L. No. 93-406, 88 Stat. 1-514, 3001-4082 (codified as amended at 29 U.S.C.A. §§ 1001-1461 (1985 & 1994 Supp.)). Respondent argues that because Andrews' suit involves an interpretation of ERISA, it is preempted by ERISA.

Respondent's argument establishes a straw man argument: if Andrews' case requires an interpretation of ERISA, then respondent would be correct. Andrews, however, is not bringing an ERISA claim. His suit requires interpretation of neither ERISA nor an ERISA governed trust. That ERISA may provide alternative relief for Andrews does not

mean that Andrews brought his suit under ERISA and should not invoke the preemption provision.

Because respondent misstates Andrews' argument it overlooks the existence of grossly divergent lower court opinions, the frustration of the lower courts, and the affect preemption will have on thousands of employees of ERISA governed plans. This petition should be granted to clarify the law on whether ERISA preempts state lawsuits, which do not require interpretation of ERISA, and to preserve the existing state laws that protect employees.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent makes several factual assertions which compel a response.

Andrews reported Williams, his supervisor, to the Trust's attorney because he suspected Williams of

improperly seeking reimbursement for travel expenses. Appendix A to Petition at 4. In his complaint, Andrews alleges that Williams either received duplicate reimbursement for the same expense or was reimbursed for expenses not related to the Trust's business or both. Appendix A hereto at ¶ 5. Andrews also reported that Williams received cash from his airline tickets by converting them to a lower class of travel and pocketing the difference in fares.

Respondent alleges, as a defense, that Andrews was fired because he wrote a check that exceeded his authority under a Trust Agreement. The Trustees, however, told Andrews that he could write the check in question. Appendix B hereto at 3-4. Significantly, the Trustees, except for Williams, have not testified that this was the reason they terminated

Andrews. Appendix B hereto at 1-3, 5-6, 7. The actual reason the Trustees terminated Andrews is a factual question best left to the jury.

ARGUMENT

I. The Court Should Grant Certiorari Because Expanding ERISA Preemption To State Law Claims Which Do Not Require Interpretation Of ERISA Or ERISA Governed Trusts Would Limit State Created Employee Rights For All Employees Of An ERISA Governed Plan.

Respondent agrees that courts have not yet resolved this issue.[1] Yet respondent argues that the decision by the Alaska Supreme Court will not have a significant impact. The Alaska Supreme Court held that ERISA preempts a state law cause of action, which does not require interpretation of ERISA, simply

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[1] "There have been no reported cases since the enactment of ERISA, nearly twenty years ago, involving this unique combination of facts and relationship." Respondent's Brief In Opposition to the Petition For Writ of Certiorari at 6 ("Opposition").

because there is an alternative cause of action under ERISA. Petition, Appendix A.

The impact of such a holding cannot be overstated. It will preempt a multitude of state law remedies which will either leave injured employees with no redress for their injuries or require that federal courts develop an extensive body of federal common law. General American Life Ins. Co. v. Castonguary, 984 F.2d 1518, 1522 (9th Cir. 1993) ("federal courts would have to invent a federal common law of contracts, torts, property, corporations -- something that would run against the grain of our federal system.").

> If ERISA preempted all state law relating to employee benefits plans, a dangerous vacuum would result. Progressive state legislation would be frustrated and Congress might not fill the void with the necessary federal legislation. Major problem

> areas in employment law could be left unaddressed. The healthy pluralism envisioned by Justice Brandeis would be vitiated. This would be counterproductive to ERISA's objective of furthering, rather than debilitating, progressive employment law.

Gregory, The Scope Of ERISA Preemption Of State Law A Study In Effective Federalism, 48 U. Pitt. L. Rev. 427 at 457 (1987). The holding of the Alaska Supreme Court combined with the absence of a clear decision by this Court threatens a vast number of state laws.[2]

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[2] Respondent incorrectly states that Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 474 (1990) addressed the "pivotal issue" in this case. Opposition at 7. Ingersoll-Rand held that a state lawsuit, which depended upon the existence of an ERISA governed plan, was preempted. Andrews' suit does not depend upon the existence of an ERISA governed plan.

II. Andrews' Case Does Not Require An Interpretation Of ERISA Or The ERISA Governed Plan.

A. Andrews' Suit Will Not Require An Interpretation Of ERISA Provisions Regulating Fiduciaries.

Respondent states that certain ERISA provisions determine "the circumstances under which an ERISA trustee may be properly reimbursed." Opposition at 4. Defendant is correct that there are certain provisions of ERISA which regulate reimbursement of fiduciaries. 29 U.S.C. §§ 1104, 1106(b) and 1108(c). There are also, however, state laws governing fiduciary responsibilities of trustees. A.S. 13.36.070; A.S. 11.46.620. Andrews' suit is based upon these state laws.

The fact that ERISA may provide additional regulation of fiduciary relationships does not mean that ERISA preempts Andrews' suit. See Etheridge v.

Harbor House Restaurant, 861 F.2d 1389, 1404 (9th Cir. 1988). ERISA preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan[.]" 29 U.S.C. § 1144(a). State laws regulating fiduciaries are entirely independent from ERISA. They apply to all fiduciary relationships. Andrews' suit is based on these state laws. It is not based upon ERISA's regulation of fiduciaries. Therefore, Andrews' suit will not require an interpretation of ERISA and, in accordance with the purpose behind ERISA's preemption provision, is not preempted.

B. Andrews' Suit Does Not Depend On The Existence Of An ERISA Regulated Trust.

Andrews' claims are based upon the existence of a trust, but are not based upon the existence of an **ERISA** trust. Alaska law regulates fiduciaries to all

trusts. See A.S. 13.06.050(45). It, thereby, covers both trusts governed by ERISA and trusts which are entirely unrelated to ERISA. Id. Andrews is seeking to enforce Alaska law regulating trusts, not ERISA. While his claim is premised upon the existence of trust, it is not based upon whether ERISA governs the trust.

C. Andrews' Suit Will Not Require Interpretation Of ERISA's Provision Prohibiting Misuse Of Trust Funds.

The alleged misuse of trust funds is a question of Alaska law and does not depend upon ERISA. Alaska law governing trusts requires trustees to properly use funds entrusted to them. A.S. 13.36.070; A.S. 11.46.620. Andrews' allegations, if true, are sufficient to show that Williams breached Alaska law by seeking inappropriate reimbursement of travel expenses.

D. Andrews Will Not Need To Interpret The Terms Of The Trust Agreement.

Respondent alleges that Andrews was fired for exceeding his check writing authority provided in a Trust Agreement. The terms of the document, however, do not control. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). Instead, it is the motivation of those who terminated Andrews that determines whether he was fired in retaliation for reporting a breach of fiduciary duties. Id., at 407, 108 S. Ct. at 1882, 100 L. Ed. 2d at 419-420; Eldridge v. Felec Services, Inc., 920 F.2d 1434, 1439 (9th Cir. 1990). Thus, under Lingle, if the Trustees fired him because they thought he was reporting a violation of fiduciary responsibilities, Andrews could maintain his suit. This is true even if Andrews'

report was itself mistaken and Williams was not violating any fiduciary duty. Conversely, Andrews would not be able to maintain his suit if the Trustees fired him without intending to retaliate for reporting a fiduciary violation. The termination would be legitimate even if Andrews was reporting actual, undisputed theft of trust funds. The issue is the Trustee's motivation, not an actual breach of fiduciary responsibility. Id.

E. Alaska Law Provides Public Policy Against A Retalitory Discharge.

Respondent also argues that ERISA is the source of the public policy that Andrews alleges was violated. ERISA, however, is only one source of public policy in the state. Public policy includes "the entire body of law in the state." Luedtke v. Nabors Alaska Drilling Inc., 768 P.2d 1123, 1132

(Alaska 1986). Alaska has a public policy against firing someone for reporting a breach of fiduciary duty. Reed v. Municipality of Anchorage, 782 P.2d 1155, 1158 (Alaska 1989) see also Eldridge v. Felec Services, Inc., 920 F.2d at 1437.

F. ERISA Preemption Provision Was Intended To Preempt Suits Requiring Interpretation Of ERISA: Andrews' Suit Is Not Preempted.

The purpose of the ERISA preemption provision is to provide for uniform interpretation of ERISA covered plans. It is not intended to insulate employers from state court remedies for injury to their employees. See Halifax Packing Co. v. Coyne, Inc., 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). Allowing Andrews to pursue his claims is consistent with the purpose of ERISA in that they do not interpret ERISA or an

ERISA governed trust. These state law claims will not lead to divergent interpretation of ERISA, and will, therefore, not create a significant burden upon administration of the ERISA governed Trust. The existence of similar provisions or policies under ERISA does not mean that Andrews' suit requires interpretation of ERISA. Allowing Andrews to proceed with his suit will allow employees to enforce state laws enacted for their protection. Improving protection for employees was ERISA's overall goal. Id.

III. The Existence Of An Alternative ERISA Remedy Does Not Preempt Alaska Law.

The fact that ERISA may provide a cause of action for the facts alleged in this complaint does not mean that the ERISA remedy is the only remedy. ERISA provides that any law, which relates to

an ERISA plan, is preempted. 29 U.S.C. § 1144(a). It does not state that alternative state law causes of action, which are unrelated to ERISA, are preempted. It is consistent with the overall intent of ERISA, which is to protect employees, to allow unrelated state laws protecting employee rights to stand. See Pace v. Signal Technology Corp., 417 Mass. 154, 160, 628 N.E.2d 20, 22 (Mass. 1994). To now hold, as the Alaska Supreme Court held, that ERISA preempts all state remedies to the extent a remedy is also provided by ERISA would judicially create broader preemption than envisioned by Congress.

IV. The Alaska Supreme Court's Decision Conflicts With Decisions In Other Jurisdictions.

Respondent attempts to distinguish conflicting cases with immaterial distinctions. Respondent contends that

cases cited by Andrews[3] do not conflict because none of them involve "Section 510", and:

> None of the cited cases required interpretation or application of the fiduciary responsibility provisions of ERISA or of the governing plan document, nor did any involve relationships among ERISA cofiduciaries or public policies codified in ERISA."

Opposition at 9.

Respondent's argument misses the point. The crucial issue is the scope of ERISA preemption -- whether ERISA preempts state law causes of action that do not require interpretation of ERISA or ERISA governed plans. These cases are

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[3] General American Life Ins. v. Castonguay, 984 F.2d 1518 (9th Cir 1993); Clarks v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989); Etheridge v. Harbor House Restaurant, 861 F.2d 1389 (9th Cir. 1988); Sorosky v. Burroughs Corp., 826 F.2d 794 (9th Cir. 1987); Lane v. Goren, 743 F.2d 1337 (9th Cir. 1984); Pace v. Signal Technology Corp., 417 Mass. 154, 628 N.E.2d 20 (Mass. 1994); and Cutler v. Phillips Petroleum Co., 71 Wash. App. 511, 859 P.2d 1251 (Wash. App. 1993). These cases are summarized on pages 13-17 of the petition.

significant because they hold that ERISA does not preempt causes of action which do not require an interpretation of ERISA or ERISA governed plans. Respondent attempts to distinguish these cases by arguing that they do not address the specific ERISA provisions, which respondent argues are pertinent here, *i.e.*, ERISA regulation of fiduciary relationships. This is not a meaningful distinction. Andrews is suing under state law, has only alleged violations of state law, and will only prevail by showing a breach of state law. These cases support his contention that ERISA does not preempt this suit because it does not involve an interpretation of ERISA or ERISA governed plans. The cases, therefore, provide contrary authority to the Alaska Supreme Court's decision.

CONCLUSION

For the reasons stated above and in the petition, the Court should issue the writ of certiorari.

Respectfully submitted,

Richard H. Friedman
John Bernitz

Counsel for Petitioner
Ronald B. Andrews

APPENDIX A - EXCERPTS FROM ANDREWS' COMPLAINT

COMES NOW plaintiff, by and through his attorney, Jeffery A. Friedman, of the Law Office of Friedman & Rubin, and alleges the following:

COUNT I

1. The Alaska Operating Engineers-Employers Training Trust Fund (hereinafter, Trust) is a trust fund established pursuant to the Labor Management Relations Act of 1947, as amended. The purpose of the Trust is to provide training and retraining programs for qualified members of the International Union of Operating Engineers Local 302.

2. The Trust is governed by the Labor Management Relations Act of 1947, as amended, the Employee Retirement Income Security Act of

1974, and other applicable federal and state laws.

3. Plaintiff was employed by the Trust as its Administrative Manager from May of 1985 through October 31, 1989. Plaintiff is also a member of the International Union of Operating Engineers Local 302.

4. Between May of 1985 and October of 1989, plaintiff complained several times of improper trust transactions.

5. During this time and while performing his duties as Administrative Manager, plaintiff found documents indicating that one of the Trustees of the Trust, George Williams, may have intentionally or negligently charged the Trust twice for the same trust expenses. These documents also indicated that Mr.

Williams may have charged the Trust for non-trust related expenses.

6. Misuse of Trust funds is a violation of the public policy of the State of Alaska and the United States of America, as well as a violation of the Employee Retirement Income Security Act of 1974. Misuse of Trust funds also has the effect of reducing the amount of training benefits available to plaintiff and other eligible union members.

7. On October 27, 1989, plaintiff informed the Trust's attorney, James Gasper, of the potentially improper reimbursements received by Mr. Williams. Mr. Gasper informed plaintiff that the statute of limitations on a labor-management dispute was two years.

8. On October 31, 1989, plaintiff's employment with the

Trust was terminated. Plaintiff's employment was terminated in order to prevent him from giving information and testifying about the possible misuse of Trust funds.

9. Plaintiff's termination violated the express public policy of the State of Alaska and the United States of America.

10. As a result of the actions described above, plaintiff suffered damages in an amount to be determined at trial, but in any event greater than $50,000.00.

COUNT II

11. Plaintiff realleges the allegations in paragraphs 1-10, above.

12. As a part of the contract of employment between the Trust and plaintiff, the Trust had an

obligation to treat plaintiff fairly and in good faith.

13. As a part of the contract of employment between the Trust and plaintiff, plaintiff had an obligation to report any possible misuse of Trust funds that came to his attention.

14. The Trust breached the covenant of good faith and fair dealing by firing plaintiff for reporting possible misuse of Trust funds.

15. As a result of the actions described above, plaintiff suffered damages in an amount to be determined at trial, but in any event greater than $50,000.00.

COUNT III

16. Plaintiff realleges the allegations in paragraphs 1-15, above.

17. All of the actions described above were taken taken (sic) intentionally, in bad faith and in disregard of plaintiff's rights under the terms of his employment contract, or with reckless indifference to those rights. Accordingly, plaintiff is entitled to punitive damages in an amount to be proven at trial, but in any event greater than $50,000.00.

APPENDIX B - EXCERPTS FROM DEPOSITIONS OF THE TRUSTEES

Deposition of Ben Hermon[1]

Q Why did you decide to fire Mr. Andrews?

A Well, it appeared to me that Ron had discontinued to carry out his duties as training trust coordinator. The last three or four months, at least, that he was there, he just didn't seem to be doing his job at all. And for that reason, I thought that we needed to get someone in there who would carry out the duties of the position.

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[1] This deposition was conducted under oath before a court reporter on June 26, 1992. The excerpts are from pages 15-16 and 31-32 of the reporter's transcripts.

Q What duties was he not carrying out?

A Well, he wasn't -- he wasn't carrying out any of the orders of the chairman of the Short Committee which I belonged to for one thing. He wasn't answering phone calls and I was told that he wasn't doing very much for the trainees at the time either, apparently. Or it seemed to me that Ron had misunderstood his position in the trust that he was getting more -- I would say he was -- he thought that his responsibility was to the union rather than to the trust actually.

The fact that the union had changed hands as far as the

people at the head of it were concerned, the Alberts had gotten in and George Williams had became chairman of the trust. I think that Ron had a hard time realizing that he was working for George and the trust instead of the union. And for that reason, he -- somehow or other, he didn't feel that he should take orders from George and so therefore, he kind of shirked his responsibilities and just didn't do his job.

. . . .

Q You don't recall any questions about whether those purchases were proper, at least not from Ron?

A Well, there was one little thing that I didn't consider

much weight actually, but Ron actually paid for the dozer and it seems like to me the backhoe or something with a check, signing the checks. Whereas he only had authority to sign for $5,000.00 worth, he signed for these items which were considerably more and he shouldn't have done that. That was an impropriety.

But that was the only thing that I remember that was very far out of line. I think the Alberts brought up the question of whether Ron had gone out on his own actually and bought the dozer but he didn't.

He and I and one other person -- I think it was Bob Anders -- went to Tope Equipment and looked over the equipment and

determined that it was apparently in good shape and that it was very worthwhile. The cost of them, I think, was 60 some thousand dollars in that case and so Ron wasn't -- actually he didn't make the determination himself. I think all three of us that were out there and looked at the machine decided that it was the one we wanted and he went ahead and did the buy. He made out the check and paid for it.

Deposition of Michael Brechan[2]

Q Do you recall when it was decided among the management side to terminate Mr. Andrews?

A No. We had this meeting and we took this action.

Q Was there any discussion about taking that action prior to this meeting.

A Not that I recall.

Q Was there any discussion about it at the meeting?

A Yes.

Q What kinds of things were discussed?

A Basically that he had been having considerable difficulty taking directions from the

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[2] This deposition was conducted before a court reporter under oath on June 25, 1992. The excerpt is from pages 22-23 of the reporter's transcript.

trustees and performing those duties and that he had not been working out well in general terms with either the union trustees or the management trustees.

(Pause)

Q Other than the difficulties that you mention before that you personally had with Mr. Andrews, do you know of any things that he was doing wrong that led to his termination?

A Not specifically, no.

Q And was your decision to vote in favor of firing Mr. Andrews based on what you were told during that meeting as well as your own experiences with him?

A Yes, it was.

Deposition of Joseph C. Albert[3]

Q Was there any discussion during the meeting -- and I'm referring to the meeting in which Ron was fired. During that meeting, was there any discussion as to why Ron should be fired, Ron Andrews?

A Same; insubordination, wouldn't follow orders. That was -- everybody there, to the best of my knowledge, understood that.

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[3] This deposition was conducted before a court reporter, under oath on November 19, 1992. This excerpt is from page 28 of the reporter's transcript.